

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANTONIO PRADO,	)	Case No. 09-4419 SC
	)	
Plaintiff,	)	MEMORANDUM OF DECISION,
	)	FINDINGS OF FACT, AND
v.	)	<u>CONCLUSIONS OF LAW</u>
	)	
ALLIED DOMEQ SPIRITS AND WINE	)	
GROUP DISABILITY INCOME POLICY,	)	
	)	
Defendant.	)	
	)	
	)	
LIBERTY LIFE ASSURANCE COMPANY OF	)	
BOSTON,	)	
	)	
Real Party in Interest.	)	

**I. INTRODUCTION**

Plaintiff Antonio Prado ("Prado" or "Plaintiff") commenced this action against the Allied Domecq Spirits and Wine Group Disability Income Policy ("Allied" or "the Plan"), bringing three causes of action: (1) failure to extend disability benefits in accordance with the Plan and the Employee Retirement Income Security Act of 1974 ("ERISA"), 28 U.S.C. § 1132; (2) violation of section 10111.2 of California's Insurance Code; and (3) failure to produce records under 29 U.S.C. § 1332(c) and 29 C.F.R. § 2560.503-1. The Real Party in Interest is the Claims Administrator, Liberty Life Assurance Company of Boston ("Liberty" or "Defendant"). Plaintiff and Liberty have now moved for judgment pursuant to Rule

52 of the Federal Rules of Civil Procedure. ECF Nos. 40 ("Pl.'s Mot."), 49 ("Def.'s Opp'n"), 44 ("Def.'s Mot."), 68 ("Pl.'s Opp'n"), 73 ("Def.'s Reply").<sup>1</sup> Trial occurred on June 6, 2011, during which the Court requested both parties submit proposed findings of fact and conclusions of law. ECF No. 77. The parties have complied with the Court's request. ECF Nos. 81 ("Def.'s FFCL"), 82 ("Pl.'s FFCL"). Having read and considered the parties' respective submissions, the Court rules as follows.

## II. FINDINGS OF FACT

### A. Evidence Considered by the Court

As the Court will discuss infra, abuse-of-discretion review of an ERISA claim denial is generally limited to the administrative record; that is, the papers the insurer had when it denied the claim. Jebian v. Hewlett-Packard Co. Emp. Benefits Org. Income Prot. Plan, 349 F.3d 1098, 1110 (9th Cir. 2003). However, if the denial is made by an administrator operating under a conflict of interest, the court has discretion to permit discovery beyond the administrative record into the nature, extent, and effect of this conflict on the administrator's decision-making process. Welch v. Met. Life Ins. Co., 480 F.3d 942, 949-50 (9th Cir. 2007).

Similarly, if an administrator presents a new reason for its denial in its final administrative decision, the claimant is entitled to present evidence regarding that denial and to have the district court consider it. Saffron v. Wells Fargo & Co. Long Term Disability Plan, 522 F.3d 863, 872 (9th Cir. 2008). Evidence

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<sup>1</sup> Plaintiff's Motion was erroneously electronically filed as a trial brief.

1 considered beyond the administrative record "need not satisfy the  
2 strict rules for the admissibility of evidence in a civil trial,  
3 and may be considered so long as it is relevant, probative, and  
4 bears a satisfactory indicia of reliability." Tremain v. Bell  
5 Indus., Inc., 196 F.3d 970, 978 (9th Cir. 1999).

6 On August 2, 2010, the Court determined that Liberty operated  
7 under a conflict of interest and permitted Plaintiff to conduct  
8 limited discovery into the "nature, extent, and effect of Liberty's  
9 conflict of interest on its decision-making process." ECF No. 35  
10 ("Aug. 2, 2010 Order").

11 With this framework in mind, the Court evaluates the  
12 admissibility of evidence submitted by the parties.

13 1. The Claim File

14 Liberty submits the Claim File ("CF"), which it alleges is the  
15 complete record on which Liberty based its denial of Plaintiff's  
16 benefits claim and his subsequent appeal. Gray Decl. Ex C ("CF").<sup>2</sup>  
17 The Claim File consists of 4090 pages of records and one DVD  
18 containing surveillance video of Plaintiff from September and  
19 October 2009. Plaintiff does not challenge the authenticity of the  
20 Claim File; in fact, it contains numerous documents Plaintiff  
21 submitted to Liberty in support of his claim.

22 2. The Plan Documents

23 Liberty submits copies of what it alleges are the Policy and  
24 the Summary Plan Description; these are the plan documents Liberty  
25 provided to Plaintiff during the claims process. McNerney Decl.  
26  
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28 <sup>2</sup> Lisa Gray ("Gray"), appeal review consultant for Liberty, filed a  
declaration in support of Liberty's Motion. ECF No. 47.

1 Exs. A ("Policy"), B ("SPD").<sup>3</sup> Plaintiff alleges that Defendant  
 2 has failed to provide the Plan document and disputes whether the  
 3 two produced documents accurately reflect the terms of the Plan.  
 4 Pl.'s Mot. at 23. Plaintiff alleges that the Plan which he  
 5 participated in is titled "Hiram Walker & Sons Long-Term Disability  
 6 Plan Number 507," and that Liberty has produced no such plan. Id.  
 7 Plaintiff states: "Without the Plan, who knows whether there is a  
 8 difference between the insurance policy, which Liberty has been  
 9 using as if it were the Plan, and the Plan itself." Pl.'s Mot. at  
 10 24.

11 The SPD is clearly identified as the summary plan description  
 12 of "Hiram Walker & Sons Inc. Long Term Disability Plan Number 507."  
 13 SPD at 26.<sup>4</sup> The Policy contains no mention of "Hiram Walker &  
 14 Sons" or "Plan Number 507," and identifies Allied Domecq Spirits  
 15 and Wine as the Plan's sponsor. Policy at 2. Both the Policy and  
 16 the SPD bear the same policy number: GF3-841-431862-01. Policy at  
 17 1; SPD at 3. To authenticate the Policy and SPD, Liberty submits  
 18 the declaration of Carolyn McNerney ("McNerney"), who identifies  
 19 herself as the current "Assistant Corporate Secretary for Pernod  
 20 Ricard USA," an "affiliated company" that she claims currently  
 21 administers the Plan. Id. ¶ 1. McNerney states: "I can declare  
 22 that [the Policy and the SPD] are true and authentic copies of the  
 23 Group Disability Income Policy issued to Allied Domecq Spirits and  
 24 Wine . . . and the operative Summary Plan Description." Id. ¶ 2.

25  
 26 <sup>3</sup> Carolyn McNerney ("McNerney") filed a declaration in support of  
 Liberty's Motion. ECF No. 48.

27  
 28 <sup>4</sup> In this Circuit, the SPD constitutes a plan document that "should  
 be considered when interpreting an ERISA plan." Bergt v. Ret. Plan  
 for Pilots Employed by Mark Air, Inc., 293 F.3d 1139, 1143 (9th  
 Cir. 2002).

McNerney declares that when Allied purchased Hiram Walker-Gooderham & Worts of Canada in 1987, "the Hiram Walker & Sons Long-Term Disability Plan Number 507 became known as the Allied Domecq Spirits & Wine USA Inc. and Subsidiary & Affiliated Companies Group Welfare Insurance Plan for Employees in the US." Id. ¶ 4.

McNerney states that "after a diligent and complete search, no other plan documents have been located." Id. ¶ 9.<sup>5</sup>

In light of the above, the Court finds that the Policy and SPD produced during the claim process contain satisfactory indicia of reliability, and accepts the terms provided in the Policy and the Summary as the terms of the Plan.

### 3. Other Evidence Submitted by Liberty

Liberty submits the declaration of Paula McGee ("McGee"), litigation manager of disability claims for Liberty. ECF No. 45. McGee declares that through her position as litigation manager, she is familiar with Liberty's claims and underwriting operations, as well as Plaintiff's claim. Id. ¶ 2.

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<sup>5</sup> In its August 2, 2010 Order, the Court sustained Plaintiff's objection to a similar declaration by McNerney in which she attempted to authenticate these plan documents, and permitted Plaintiff to conduct discovery of the plan documents. Aug. 2, 2010 Order at 13. While Liberty was uncooperative in responding to Plaintiff's discovery requests, as the Court discusses *infra*, Liberty did produce a document that it identified as "Group Income Disability Policy GF3-841-431862-01" and five amendments to it. Cogan Decl. Ex. D. ("Exhibit D"). Both the Policy produced during the claims process and Exhibit D bear the same policy number ("GF3-841-431862-01"). The first pages of both documents differ (Exhibit D is signed by the "secretary" and "president," while the Policy is not). Id. at 2. Exhibit D includes Allied's application for group insurance, id. at 40, while the Policy does not. Exhibit D contains Amendments 1 through 5, Ex. D. at 41-52, while the Policy produced during the claims process does not. Otherwise, the two documents appear to be identical.

1                   4.     Evidence Submitted by Plaintiff

2             Plaintiff submits a declaration of Steven Moon ("Moon"), who  
 3 identifies himself as the work capacity evaluator who performed a  
 4 Functional Capacity Evaluation ("FCE") of Plaintiff on February 25,  
 5 2009. Moon Decl. ¶¶ 1-2.<sup>6</sup> Moon's FCE report is included in the  
 6 Claim File. CF 0583-0592. In his declaration, Moon responds to  
 7 the surveillance footage taken in September and October 2009.  
 8 Plaintiff also submits his own declaration in which he responds to  
 9 this footage. ECF No. 42.<sup>7</sup>

10            Plaintiff also asks the Court to take judicial notice of the  
 11 Bristol Hospital 2008 Annual Report and a motion filed in an  
 12 unrelated action against Liberty in District Court for the Southern  
 13 District of Ohio. ECF No. 69. The Court finds that these  
 14 documents lack the indicia of reliability required under Tremain,  
 15 196 F.3d at 978, and it declines Plaintiff's request.

16            In finding the facts below, the Court relies on the evidence  
 17 above and the facts decided and actually litigated in the prior  
 18 denial-of-benefits action between the parties, Prado v. Allied  
 19 Domecq Spirits and Wine Gr. Disability Income Policy, No. 05-2716,  
 20 2008 WL 191985 (N.D. Cal. Jan. 22, 2008) ("Prado I").

21                   **B. The Parties**

22            Plaintiff is a California resident; from February 1987 to  
 23 September 2003, he worked as a production manager for Mumm Napa  
 24 Valley ("Mumm"), a subsidiary of Allied Domecq Spirits and Wine.

25                   <sup>6</sup> ECF No. 41.

26                   <sup>7</sup> Liberty objects to the declarations of Moon and Plaintiff. ECF  
 27 No. 52. The Court OVERRULES Liberty's objection, finding the  
 28 declarations relevant under Saffron, 522 F.3d at 872, as related to  
 a new reason for denial offered by Liberty in its final  
 administrative decision.

1 Prado I at 1. As a production manager, Plaintiff managed all  
2 aspects of winery bottling and warehouse operations, including  
3 overseeing bottling, quality control, warehousing, specialty  
4 packaging, procurement, inventory, planning, and scheduling. CF  
5 4083.

6 Liberty insured Plaintiff's long-term disability plan through  
7 a group disability policy. Prado I at 1. Liberty served as the  
8 claims administrator. Id.

9 **C. The Plan**

10 Plaintiff was a beneficiary of his employer's sponsored long-  
11 term disability plan. Id. Under the Plan described in the  
12 Policy, Liberty must pay out a monthly benefit to participants who  
13 meet the definitions of "disabled" or "partially disabled." Policy  
14 at 6. The Policy provides two definitions of "disability" -- one  
15 for the first twenty-four-month period, and a second for the time  
16 following this period. Policy at 4. A participant is disabled  
17 during the first twenty-four months if he "is unable to perform all  
18 the material and substantial duties of his occupation on an Active  
19 Employment basis because of an injury or sickness." Policy at 4  
20 (emphasis added). After this period, a person is disabled if he  
21 "is unable to perform, with reasonable continuity, all of the  
22 material and substantial duties of his own or any other occupation  
23 for which he is or becomes reasonably fitted by training,  
24 education, experience, age and physical and mental capacity." Id.  
25 at 5 (emphasis added). The parties and the Court refer to these as  
26 the "own occupation" and "any occupation" periods.

27 The Policy gives Liberty the authority, "in its sole  
28 discretion, to construe the terms of this policy and to determine

benefit eligibility hereunder." Id. at 25. "Liberty's decisions regarding construction of the terms of this policy and benefit eligibility shall be conclusive and binding." Id. The Policy requires that "[p]roof of claim must be given to Liberty." Id. at 27. This proof must cover the date the disability started, the cause of the disability, and the degree of the disability. Id.

**D. Plaintiff's Injury**

Plaintiff first injured his back while employed with Mumm in 1989. CF 1399, 2308. While on the job, a three-to-four-hundred-pound piece of machinery fell on him when a forklift chain became loose. CF 1399. Although Plaintiff was injured, he continued to work as a production manager for Mumm. Id. After chiropractic care, physical therapy, and conservative treatment failed to improve his chronic pain, Plaintiff sought treatment of a neurosurgeon, Dr. Jay Levy ("Dr. Levy"), who performed an L5-S1 discectomy in 1991. Id.

The discectomy failed to cure Plaintiff's pain; Plaintiff developed "internal derangement of his left knee," which was treated with steroid injections. CF 1294. Plaintiff complained of headaches, dizziness, blurred vision, and blackouts. CF 1400. Plaintiff had arthroscopic surgery on his knee in August 1999. CF 1345. While the surgery helped, he still claimed to have knee pain. He also complained of neck pain radiating into the left shoulder and down the arm to the ring and little fingers, with numbness, weakness, and tingling in the left arm. CF 1376. His mobility and ability to lift weight were restricted. CF 1376, 1377.



1 On September 1, 2003, Plaintiff informed Liberty that his back  
2 pain and headaches had escalated to the point that he could no  
3 longer continue working. CF 0561. In October 2003, Dr. Levy  
4 stated that a lumbar MRI scan showed L5-S1 disc collapse and a  
5 cervical MRI scan showed spondylosis. CF 2309. Dr. Margaret A.  
6 Schlatter ("Dr. Schlatter") evaluated Plaintiff on January 19,  
7 2004. CF 1469. She reported that at the time, Plaintiff was  
8 experiencing "daily chronic headaches" at a "10 out of 10  
9 severity." Id. Dr. Schlatter noted that Plaintiff had "fairly  
10 normal range of motion" in his neck and back and a typical gait.  
11 CF 1470.

12 Plaintiff filed a disability benefits claim, which Liberty  
13 received on March 25, 2004. CF 2309. On June 2, 2004, Liberty  
14 denied Plaintiff's claim. CF 0561. Liberty provided the following  
15 reason for the denial: "There is insufficient evidence to show  
16 that you were disabled from the date you stopped working throughout  
17 the Elimination Period. There is insufficient evidence on file to  
18 support restrictions and limitations that preclude you from  
19 performing your occupation from September, 2003, to the present."  
20 Id. Plaintiff appealed the decision and, on August 4, 2004, after  
21 further review, Liberty upheld its initial denial. Id.

22 During the pendency of the appeal, Plaintiff was referred to  
23 an orthopedic spine surgeon, Dr. James Zucherman ("Dr. Zucherman").  
24 CF 1852. Dr. Zucherman noted normal gait and hip flexion, but  
25 recorded that Plaintiff had reported pain that was intense and  
26 "made worse by sitting, rising from sitting, leaning forward,  
27 walking, lying on the back, lying on the stomach, driving, coughing  
28 or sneezing, and bending forward." CF 1852-1854. Dr. Zucherman

1 recommended surgery. Id. In January 2005, Dr. Zucherman performed  
2 a prosthetic disk replacement at L5-S1. CF 2309. While this  
3 procedure initially decreased Plaintiff's back pain and allowed for  
4 normal movement, subsequent visits through the rest of 2005 and  
5 2006 noted continued complaints of back pain and neck pain. Id.

6 Plaintiff then requested that Liberty reconsider its denial in  
7 light of the treatment by Dr. Zucherman and other evidence. CF  
8 0562. On May 6, 2005, Liberty informed Plaintiff that it would not  
9 reconsider the claim because Plaintiff had already exhausted his  
10 administrative remedies under ERISA. Id. Plaintiff filed suit  
11 against Liberty, seeking review of Liberty's denial of benefits.  
12 See Prado I (discussed in Part II.E, infra).

13 Plaintiff continued treatment with Dr. Zucherman during the  
14 pendency of Prado I, experiencing continued symptoms in the neck  
15 and lower back. CF 2309. Plaintiff was treated for his "chronic  
16 back pain" by Dr. Maria Sheila Tabilon ("Dr. Tabilon") on January  
17 27, 2006. CF 2632. An MRI scan performed in February 2006 showed  
18 mild bulging discs at C4-5, C5-6, and C6-7. CF 1988. In April  
19 2006, Dr. Zucherman reported that MRI scan showed degenerative disk  
20 changes in the cervical spine with no protrusions, no stenosis, and  
21 no neuroforaminal stenosis. Id. Dr. Zucherman consistently stated  
22 that Plaintiff was totally disabled and unable to work. CF 2309.

23 Plaintiff responded to several Oswestry Low Back Disability  
24 Questionnaires during his treatment, yielding scores ranging from  
25 sixty percent to eighty-six percent. E.g., CF 0739, 0737, 1783,  
26 1773.

27 On January 10, 2006, Plaintiff was evaluated by Dr. Jon  
28 Sigurdson ("Dr. Sigurdson"). CF 1989. Dr. Sigurdson noted that

1 while Plaintiff "did get benefit and improvement" from Dr.  
2 Zucherman's surgery, "the neck symptoms and headaches became more  
3 of a problem and are now bothering him more than the low back." CF  
4 1991. He concluded that the cause of Plaintiff's pain, including  
5 his headaches, was his 1989 injury. CF 1993. He concluded that he  
6 had a disability precluding heavy work, and was "temporarily  
7 totally disabled as far as the neck and arms is concerned." Id.  
8 He opined that "consideration of vocational rehabilitation and  
9 ability to return to gainful employment would be premature." CF  
10 1994.

11 On May 15, 2007, the Social Security Administration ("SSA")  
12 held a hearing to determine whether Plaintiff had become disabled  
13 from any occupation since September 2, 2003. CF 0548. Dr.  
14 Zucherman provided a medical source statement, in which he marked  
15 that Plaintiff "has not been capable of performing sustained  
16 SEDENTARY work on a regular and continuing basis." CF 0034. He  
17 reported that Plaintiff must lie down for three hours a day, and  
18 could sit a total of two hours a day, stand a total of one hour a  
19 day and walk up to an hour a day. Id. Lifting and carrying was  
20 limited to under five pounds and not more than an hour a day. Id.  
21 The presiding Administrative Law Judge ("ALJ") found that Plaintiff  
22 had been disabled from any occupation since September 2, 2003. CF  
23 0548. The ALJ identified the following "severe impairments":  
24 "degenerative disc disease of the cervical and lumbar spine; spinal  
25 stenosis with radiculopathy of the cervical spine; [and] late  
26 postoperative lumbar pain." Id. The ALJ accepted as credible  
27 Plaintiff's rating of his pain at seven on a one-to-ten scale. Id.

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**E. Prado I**

On January 22, 2008, this Court issued summary judgment in favor of Plaintiff in his then-pending action against Liberty. See Prado I. The Court found that Liberty operated under a structural conflict of interest as an entity that both made benefits determinations and paid for them. Id. at 4. It noted several instances in which this conflict appeared to influence Liberty's denial decision. Specifically, Liberty had failed to provide Plaintiff with guidance as to what information was necessary in order for Plaintiff to perfect his claim. Id. at 5. It had failed to conduct a "meaningful dialogue" with Plaintiff in deciding whether to grant or to deny benefits by failing to use reasonable diligence to contact Plaintiff's health provider. Id. at 7. The Court found this conflict "is even manifest in the briefs submitted to this Court," noting that Liberty had made statements in its briefs that contradicted or mischaracterized the administrative record. Id. at 8-9. Accordingly, the Court reviewed Liberty's denial with discounted deference. Id. at 9.

The Court concluded that Liberty abused its discretion in denying Plaintiff's claim. The Court wrote, "Liberty may not ignore Plaintiff's subjective pain complaints and instead rely solely on objective evidence if evidence of Plaintiff's pain is not available." Id. at 20. The Court awarded long-term disability benefits for the twenty-four month "own occupation" period, and it remanded the claim to Liberty to determine if Plaintiff qualified for benefits beyond the first twenty-four months based on the "any occupation" definition of disability. Id. at 21.

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**F. Remand**

Following remand, Liberty assigned Plaintiff's claim to Elizabeth Kiernan ("Kiernan"), a disability claims technical specialist for Liberty. At that time, the Claim File consisted of the entire record before this Court in Prado I, as well as workers' compensation records and other medical records produced by Plaintiff during Prado I. CF 0007, 3032-4089.

Kiernan sent Plaintiff's counsel a letter on July 9, 2008 requesting that Plaintiff complete several forms. On September 15, 2008, Plaintiff's counsel returned the completed forms to Kiernan. CF 3028. In his responses to an activities questionnaire, Plaintiff stated that he was able to sit, stand, or walk for periods of ten to fifteen minutes. CF 3023. He stated that he left the house daily and was able to drive his daughter to school each day, work in his garden, and wash his car. Id. He reported that he sometimes would help his wife with grocery shopping by carrying "the light things." CR 3024. However, Plaintiff stated that back pain, neck pain and headaches prevented him from performing any gainful employment. CF 3025.

On September 15, 2008, Liberty requested additional medical information from Plaintiff's identified providers for the period from June 1, 2005 to present. Liberty also sent a letter to Plaintiff's counsel notifying him of the request. CF 3020-3022. On September 19, 2008, Plaintiff's counsel responded, and the records sought were added to the Claim File. CF 2347-3011, 2316-2346.

Liberty did not request an examination of Plaintiff. Rather, Liberty referred the claim file to Dr. C. David Bomar ("Dr. Bomar")

1 for a paper review of Plaintiff's claim. Dr. Bomar filed his  
2 review on October 28, 2008. CF 2308-2313. Dr. Bomar concluded  
3 that the file did not support "inability to work full time as of  
4 2/28/06 to the present." Id. Dr. Bomar found that Plaintiff would  
5 be capable of full-time work so long as it was "restricted to light  
6 work with no lifting over roughly 20 pounds occasionally and  
7 avoidance of more than occasional bending, squatting, stooping or  
8 kneeling." Id. Dr. Bomar noted that while Dr. Zucherman  
9 consistently reported that Plaintiff was totally disabled and  
10 unable to work, "there were a number of Independent Medical  
11 Evaluations from several orthopedic surgeons and neurosurgeons from  
12 the late 1990s up to 2006, most of which gave the claimant a light  
13 work capacity with avoidance of heavy lifting." CF 2309. Dr.  
14 Bomar concluded that while "[s]ome degree of chronic low back pain  
15 would not be unexpected," "inability to sit, stand or walk  
16 frequently would not be expected." CF 2310.

17 On October 29, 2008, Liberty sent Dr. Zucherman a letter  
18 asking for additional information, requesting a response by  
19 November 15, 2008. CF 2306-2307.

20 Liberty then referred the claim for a transferrable skills  
21 analysis. CF 2233. Liberty's vocational case manager, Michael  
22 Patrick Cooper ("Cooper"), reviewed the claim file and conducted a  
23 labor market survey. CF 2233-2235. Based on Plaintiff's  
24 background and experience and the physical restrictions and  
25 limitations described by Dr. Bonar, Cooper determined that  
26 Plaintiff was capable of full-time sedentary work and light work  
27 capacity, identifying five suitable occupations: winery production  
28 supervisor, wholesale wine sales representative, telephonic

1 customer service representative, office assistant-production plant,  
2 and small parts assembly. Id. Cooper also stated that these  
3 occupations existed within Plaintiff's local and regional economy.  
4 Id.

5 Liberty then referred the claim file for an "independent peer  
6 review" with Dr. Richard Kaplan ("Dr. Kaplan"). CF 2215-2230. Dr.  
7 Kaplan did not examine Plaintiff personally. CF 2227. In his  
8 December 17, 2008 report, Dr. Kaplan claimed that he had tried on  
9 three occasions to contact Dr. Zucherman, but that Dr. Zucherman  
10 did not respond. CF 2223. These calls were allegedly made on  
11 December 18, 2008 at 3:07 a.m. EST, December 19, 2008 at 12:20 p.m.  
12 EST, and December 22, 2008 at 9:46 a.m. EST. CF 2223.<sup>8</sup> Dr. Kaplan  
13 concluded that after reviewing Plaintiff's medical history: "I  
14 cannot identify any restrictions and limitations as of 2/2/06." CF  
15 2225. Dr. Kaplan stated: "any restrictions which are reported in  
16 terms of cervical and lumbar range are essentially based on  
17 subjective symptoms of pain with no objective anatomical basis for  
18 those findings." Id. Dr. Kaplan stated: "as of the present time  
19 the claimant's presentation is essentially that of subjective pain  
20 with subjective limitations in spinal range of motion without any  
21 anatomical lesion or physiological reason to explain these reported  
22 symptoms." Id. Dr. Kaplan concluded that Plaintiff was able to  
23 perform at the light physical demand level, writing: "a return to  
24 some form of gainful employment . . . would not only be possible  
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26 <sup>8</sup> Plaintiff notes that Dr. Kaplan dated and signed his report on  
27 December 17, 2008, which is before the dates on which Dr. Kaplan  
28 claims these calls were made and not returned. Plaintiff argues  
this is evidence that Dr. Kaplan had "no serious interest in Dr.  
Zucherman's opinion," and suggests this "may explain why the  
purported phone calls are made at odd times, such as the one  
claimed to be made at 3:47 a.m." Pl.'s Mot. at 16-17.

1 but would also be highly recommended from a therapeutic  
2 perspective." CF 2227.

3 Kiernan sent Dr. Zucherman a letter on January 13, 2009  
4 requesting his response to Dr. Kaplan's report. Liberty made  
5 several extensions of the deadline for Dr. Zucherman to respond,  
6 ultimately extending it to February 28, 2009. CF 2198. Dr.  
7 Zucherman did not respond by this deadline.

8 On March 2, 2009, Kiernan sent Plaintiff's counsel a letter  
9 denying Plaintiff's claim for long term disability benefits,  
10 finding that Plaintiff did not meet the definition of "disabled"  
11 for the "any occupation" period. CF 2194-2917. The denial letter  
12 did not identify Dr. Kaplan, Dr. Bonar, or Cooper by name, but it  
13 did state that a board-certified orthopedic surgeon had reviewed  
14 Plaintiff's claim and concluded that it did "not support inability  
15 to work full time as of 2/28/06 to the present." CF 2195. The  
16 denial letter noted Dr. Zucherman's failure to respond to Dr.  
17 Kaplan's review. The denial letter noted that a vocational case  
18 manager "has identified occupations in Mr. Prado's local and  
19 regional area which are at the light level." CF 2196.

20 The denial letter informed Plaintiff of the procedure for  
21 requesting a review of the denial. It stated that Plaintiff's  
22 appeal should include "an opinion by Dr. Zucherman of the peer  
23 review, any office notes, diagnostic test results, hospital  
24 records, or any additional information which you feel will support  
25 Mr. Prado's claim." CF 2196.

26 On April 12, 2009, Plaintiff's counsel wrote Kiernan,  
27 requesting the Claim File, "all ERISA plan documents," and a number  
28 of other documents. CF 2189-2192. The list of documents sought



1 was extensive, and included twenty-six enumerated requests.  
2 Plaintiff sought information on the orthopedic surgeon who reviewed  
3 Plaintiff's claim, including "the number of reports prepared by  
4 this physician for Liberty Life in each of the past three years,  
5 and the number of those reports which were favorable to the  
6 granting of or extension of disability benefits, and the number of  
7 those reports which were favorable to the ending or termination of  
8 disability benefits." CF 2189. Plaintiff also sought, inter alia,  
9 "a list of things which you would accept to prove 'objective'  
10 evidence of impairment due to pain"; "the policies and procedures  
11 used by Liberty Life to assess 'self-reported' conditions, 'chronic  
12 pain,' 'failed back syndrome,' and residual pain following back  
13 surgery"; "all writings and records, whether or not in the claims  
14 file, for each 'roundtable' or group conference which discussed the  
15 claim of Antonio Prado"; "[a]ll plans or programs offered to  
16 Liberty Life claims personnel which require, encourage or permit  
17 those claims personnel to purchase or acquire Liberty Mutual  
18 stock"; and "[a]ll policies and procedures of Liberty Life which  
19 are designed to mitigate the structural conflict of interest of  
20 Liberty Life in deciding which ERISA plan beneficiaries are  
21 eligible for benefits and the financial interest of Liberty Life as  
22 payor of those benefits." CF 2189-2192.

23 On April 30, 2009, Kiernan sent Plaintiff's counsel a copy of  
24 the Claim File and the Policy, which she alleged was "all the  
25 information that was received, reviewed, and considered in our  
26 evaluation of Mr. Prado's claim." CF 2179. Kiernan claimed that  
27 Allied, not Liberty, was the plan administrator, and so Liberty was  
28 not under an obligation under ERISA to produce plan documents. Id.

1 Kiernan included the curriculum vitae of Dr. Bomar and Dr. Kaplan.  
 2 Id. Kiernan rejected Plaintiff's requests for additional documents  
 3 and information, writing: "We do not agree with your interpretation  
 4 of the scope of Liberty's disclosure requirements and we are unable  
 5 to respond to your extensive requests for information." Id.

6 On July 22, 2009, Plaintiff submitted his appeal; Liberty  
 7 received it on July 27, 2009. CF 0602, 0546-0547. Plaintiff  
 8 included with his appeal more than fifteen hundred pages of  
 9 documents. CF 0548-2176. The documents included a May 4, 2009  
 10 letter from Dr. Zucherman; Dr. Zucherman's medical records; medical  
 11 records from Kaiser Napa; a Functional Capacity Evaluation;  
 12 workers' compensation records; and the decision in Prado I.  
 13 Plaintiff also included the ALJ's decision in the SSA proceeding.  
 14 CF 0548-0555. Plaintiff restated his request for additional  
 15 information, claiming that he was entitled under 29 C.F.R. §  
 16 2560.503(m)(8)(3) and (b)(5) to documents which "demonstrate[]  
 17 compliance" with "administrative processes and safeguards designed  
 18 to ensure and to verify that claim determinations are made in  
 19 accordance with governing plan documents and that, where  
 20 appropriate, the plan provisions have been applied consistently  
 21 with respect to similarly situated claimants." CF 0546.  
 22 Plaintiff's counsel included a list of ten questions regarding  
 23 Liberty's claims procedure, such as:

24 In the event of a dispute between the opinion  
 25 of a treating physician and a consultant hired  
 26 by Liberty, do you always accept the view of  
 27 the Liberty consultant?

28 . . . . .

What would you consider to be sufficient  
 "objective" proof of impairment under the  
 circumstances of this claim? What is the

1 medical basis of your standard? Can you  
2 provide some examples of what you would accept,  
3 or what you have accepted in the past, as  
4 sufficient "objective" proof of impairment for  
5 individuals who have the same medical diagnoses  
6 as Mr. Prado?

7 . . . . .

8 If you do not have written material which  
9 provides guidance on these questions, then how  
10 does Liberty ensure that similarly situated  
11 claimants are treated alike?

12 CF 0546-0547.

13 Dr. Zucherman's May 4, 2009 response to Dr. Kaplan's review  
14 stated that Plaintiff's "functional capacity is described in the  
15 office notes of December 16, 2008, which indicate he can only sit  
16 for a few minutes, walk about 1/4 of a mile, and do only very light  
17 lifting." CF 0582. Dr. Zucherman noted that limitations "are  
18 based on subjective complaints," but stated, "just because Mr.  
19 Prado does not have focal neurologic findings, as Dr. Kaplan  
20 reports, it does not mean that he is functionally capable." Id.  
21 Dr. Zucherman wrote that while he was not a qualified medical  
22 examiner, Plaintiff in December 2008 had Oswestry function score of  
23 68, and "[i]n my experience, patients with a score this high are  
24 not even able to do light work at full time. Part-light work duty  
25 with a control over his workstation would be a reasonable  
26 expectation, in my mind." Id.

27 The Functional Capacity Evaluation ("FCE") was performed by  
28 Stephen Moon of Bay Area FCE, LLC on February 25, 2009. CF 0583.  
It consisted of an eight-hour test "to address this client's  
current work capacity" and "identify any limitations or  
accommodations needed." Id. Moon reported that Plaintiff  
completed only three of the eight hours of scheduled testing "due

1 to pain and headache complaints." Id. Plaintiff reached the sub-  
2 part time ability at the sedentary level. Id. Moon concluded that  
3 "no comments on his ability to work full time can be made at this  
4 time." Moon also concluded that Plaintiff had "given variable to  
5 high amounts of physical effort during testing." Id. Moon stated  
6 that Plaintiff's subjective complaints of pain "appeared to  
7 correlate with his observed behaviors during the testing that was  
8 able to be completed." Id. Moon stated: "There were no obvious  
9 inconsistencies with Mr. Prado's perceived abilities and his  
10 observed tolerances and clinical performance during the testing  
11 day." Id. The test included an Oswestry Low Back Disability  
12 Questionnaire on which Plaintiff received a score of 74; Moon  
13 stated that this score "represents the equivalent perception of  
14 being crippled." CF 0587. Moon concluded that Plaintiff's  
15 subjective reports of pain were "mostly reliable," based on "the  
16 overall trend and outcomes of the pain questionnaires, subjective  
17 ability log, repetitive motion testing, spinal and hand function  
18 sorts, and the general correlation between his subjective  
19 complaints and perceptions with his observed signs of discomfort."  
20 CR 0592.

21 Kiernan acknowledged receipt of Plaintiff's appeal and  
22 supporting documents in a July 28, 2009 letter. CF 0594. She  
23 refused Plaintiff's requests for additional documentation,  
24 referring to her April 30, 2009 letter. Id. The claim was  
25 forwarded to Liberty's appeal review unit in Dover, New Hampshire,  
26 and assigned to Liberty's appeal review consultant, Lisa Gray  
27 ("Gray"). CF 0003.

28

1 On August 21, 2009, Plaintiff submitted to Liberty sixty pages  
2 of additional medical literature, which Liberty added to the Claim  
3 File. CF 0463-0538.

4 On August 26, 2009, Gray sent Plaintiff's counsel a letter  
5 stating that additional time was needed to render a determination  
6 on Plaintiff's appeal. CF 0461-0462. The letter stated, "we are  
7 currently waiting for additional information from your office,  
8 which is necessary to render full and fair determination" of  
9 Plaintiff's appeal. Id. The letter did not identify the  
10 information needed.

11 Also on August 26, 2009, Gray contracted with Horsemen  
12 Investigation ("Horsemen") to perform a surveillance investigation  
13 of Plaintiff's activities around his Napa, California home. CF  
14 0542. In the investigation referral form, Gray wrote, "No  
15 neurological findings however claimant reports being able (sic) to  
16 work due to severe back and neck pain and headaches." Id.  
17 "Claimant maintains he is only able to sit/stand for 30 minutes and  
18 walk 20 minutes. States he can sit and drive a car for 30 minutes.  
19 He maintains he does not pursue any hobbies nor do volunteer work  
20 and does not participate in an exercise program." Horsemen  
21 performed the surveillance of Plaintiff's residence on September 4,  
22 5, 6, 7, and 10, 2009. CR 0391-0405.

23 On September 6, 2009, Plaintiff's counsel responded to Gray's  
24 August 26, 2009 request for additional information, stating, "I am  
25 not aware of any information that has been requested from us, which  
26 we have not provided. The only information which Liberty requested  
27 was a report from Dr. Zucherman, which was included with our  
28 submission on July 22." CF 0423. For the third time, Plaintiff's

1 counsel renewed his request for "policies and procedures with  
2 regard to how you assess claims where the work impairment is due to  
3 pain and therefore subjective in nature." Id. He wrote: "If you  
4 are aware of any tests or measurements which could be done and  
5 which would measure the extent of work impairment, please let us  
6 know. From our view, there is nothing which is better than the  
7 Functional Capacity Evaluation which we forwarded to you on July  
8 22." Id.

9 Plaintiff's counsel also renewed his request for information  
10 concerning Dr. Kaplan. Plaintiff's counsel wrote that while Dr.  
11 Kaplan was well-published, "we note that his publications do not  
12 indicate any interest at all in the type of medical condition from  
13 which Mr. Prado suffers." Plaintiff's counsel also noted that "Dr.  
14 Kaplan has a relationship to a business called Disability and  
15 Occupational Consultants . . . through which he acts as a  
16 disability evaluator. However, every report of his which we have  
17 been able to locate, and every reference to him in published  
18 judicial opinions, refers to him as a defense evaluator -- in other  
19 words, he seems to have a demonstrated pro-defense bias." Id.  
20 Plaintiff's counsel noted that Dr. Kaplan had rendered an opinion  
21 for an insurance carrier in a case involving another one of his  
22 clients, writing: "The odds that a doctor with a reasonably sized  
23 forensic practice located back east would be found on multiple  
24 files of my solo practice in California must be quite small . . . .  
25 Dr. Kaplan must be a very high volume source of defense medical  
26 reports." Id. Plaintiff's counsel concluded that given these  
27 concerns, "we think it fair to ask for the opportunity to comment  
28 upon any bias of the consultant who is being used on the appeal,

1 and we request that you provide the identity of that consultant so  
2 that we have an opportunity to comment upon his or her  
3 credentials." Id.

4 On September 14, 2009, Horsemen reported to Gray on the  
5 results of the surveillance. CF 0391-0424. Horsemen claimed that  
6 it recorded video of Plaintiff raising the hood of a bronze Chevy  
7 truck, "checking his mail," "pulling weeds," "placing five (5)-  
8 gallon buckets into the bed of a truck," "moving three (3) trash  
9 cans on wheels," "checking fluids in his pickup," as well as other  
10 activities. CF 0391-0405. Horsemen acquired roughly twenty  
11 minutes of video footage of some of these activities, which was  
12 added to the Claim File. Horsemen observed no activity on the part  
13 of Plaintiff during surveillance on September 6, 2009. CF 0399.  
14 Horsemen's report stated that on each day Plaintiff was identified,  
15 "Mr. Prado showed no visible signs of hesitation or restriction,  
16 and did not utilize any discernible means of artificial support."  
17 CF 0391, 0395, 0400, 0403.

18 On September 21, 2009, Plaintiff commenced this action,  
19 claiming that Liberty had failed to make a timely ruling on the  
20 pending appeal under 29 C.F.R. § 2560.503-1. Compl. ¶ 6. Liberty  
21 received notice of the suit on September 29, 2009, but proceeded to  
22 complete its review of the appeal. CF 0002.

23 On September 23, 2009, Gray again wrote Plaintiff's counsel  
24 stating that Liberty would need additional time to complete review  
25 of Plaintiff's appeal. CF 0406-0407. Gray claimed this extension  
26 was necessary because the volume of records received on appeal was  
27 so large and because Liberty wanted additional information to  
28 clarify Plaintiff's functional capacity and abilities. Id. Gray

1 stated that Liberty had requested a physician who was board  
2 certified in physical medicine and rehabilitation to review the  
3 claim file, and had asked this physician to contact Dr. Zuckerman  
4 to discuss Plaintiff's status. Id. Gray asked Plaintiff's counsel  
5 to "inform Dr. Zucherman and his office staff that he will be  
6 receiving a call from this reviewing physician in the next two  
7 weeks." Id. Gray refused Plaintiff's counsel's renewed request  
8 for additional documentation, and did not identify the reviewing  
9 physician by name. Id. On October 1, 2009, Gray submitted  
10 Plaintiff's claim to the consulting physician for complete review.  
11 CF 0002.

12 On October 5, 2009, Horsemen performed another surveillance of  
13 Plaintiff's residence. CF 0374. While no video was recorded of  
14 Plaintiff, Horsemen claimed that Plaintiff rolled two trash cans  
15 from the curbside to the back of his residence, drove to Napa  
16 Valley Community College, and walked onto the campus and back to  
17 his car after utilizing a computer room. CF 0374-0377.<sup>9</sup>

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18  
19 <sup>9</sup> Plaintiff argues that the Court should disregard all of the  
20 surveillance evidence, alleging it was added to the administrative  
21 record after the appeals process. Under 29 C.F.R. § 2560.503-  
22 1(i)(1) and (i)(3)(i), an administrator has forty-five days to  
23 decide a disability appeal, but may extend this time for an  
24 additional forty-five days if the plan administrator determines  
25 that an extension is required, provides written notice of the  
26 extension, and indicates the special circumstances requiring an  
27 extension of time and the date by which the plan expects to render  
28 the determination on review. Liberty's August 26, 2009 letter --  
sent less than forty-five days after its July 29, 2009 receipt of  
Plaintiff's appeal -- sought to extend Liberty's time to respond an  
additional forty-five days to October 26, 2009, but did not  
indicate the special circumstances necessitating the extension.  
Liberty's September 23, 2009 letter sought to extend Liberty's time  
to respond and indicated the special circumstances necessitating  
the extension, but was not filed within forty-five days of the  
filing of the appeal. As such, both of Liberty's attempts to  
extend review were procedurally defective. The Court finds these  
procedural defects are not proper grounds to strike evidence from  
the Claim File, however. Nor does the Court accept Plaintiff's



Dr. Gale Brown, Jr. ("Dr. Brown"), board certified in physical medicine and rehabilitation, prepared a report dated October 8, 2009. CF 0359-0371. Dr. Brown's report provided a list of "documentation reviewed," which included all the aforementioned documents, including the SSA Disability report and the video surveillance. CF 0359. Dr. Brown stated that her review addressed Plaintiff's "physical impairments and ability to perform any occupation full time, effective 2/29/06,"<sup>10</sup> but "does not address possible impairment related to chronic headaches and hypertension, as these fall beyond my current areas of expertise." CF 0360. Dr. Brown concluded that while partial physical impairment was supported by the documentation, Plaintiff "should have been able to resume full-time sedentary work by 2/29/06." CF 0360. Dr. Brown concluded that "[i]nconsistencies noted in Mr. Prado's statements, video surveillance data, and FCE performance raise questions regarding historical credibility and motivation." Id. Dr. Brown concluded that "[t]he FCE findings are considered unreliable in assessing Mr. Prado's functional capacity," and that Plaintiff's "reported severity of disability, as noted on Oswestry testing, is inconsistent with his demonstrated capacity on video surveillance." Id. Dr. Brown identified restrictions and limitations that would apply to Plaintiff as of February 29, 2006: "Occasional lift/carry/push/pull 10 pounds; No overhead work or repetitive reaching over shoulder level; Occasional stand/walk, 30 minutes per

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argument that it should disregard the surveillance video because Liberty allegedly misrepresented its reason for requesting additional time.

<sup>10</sup> The Court takes judicial notice of the fact that February 29, 2006 is not a valid date, as 2006 was not a leap year.

1 session; Brief position change (<1 minute) during periods of  
2 prolonged sitting, if needed." CF 0361.

3 Dr. Brown claimed to have made multiple attempts to contact  
4 Dr. Zucherman to obtain his opinion "as to whether Mr. Prado could  
5 have resumed full-time sedentary work by 2/29/06," with the first  
6 attempt made on September 30, 2009. CF 0370. On October 8, 2009,  
7 Brown faxed to Dr. Zucherman a letter asking that he respond to a  
8 series of questions. CF 0383-0384.<sup>11</sup> On October 20, 2009, Gray  
9 faxed Dr. Brown's letter to Dr. Zucherman a second time, asking him  
10 to respond by October 30, 2009. CF 0357-0358. Gray also wrote  
11 Plaintiff's counsel to advise that she needed more time to complete  
12 the appeal because she was still waiting for a response from Dr.  
13 Zucherman, and that if Dr. Zucherman did not respond by October 30,  
14 2009, Liberty would render a determination without it. CF 0356-  
15 0358. The next day, on October 21, 2009, Gray faxed Dr. Zucherman  
16 again, stating that "under ERISA we have a requirement to render  
17 our decision within 90 days and it has come to my attention that  
18 the deadline will be October 25, 2009; therefore should you wish to  
19 provide your opinion to the following questions, please do so by  
20 October 25, 2009." CF 0353. Gray sent a copy of the letter to  
21 Plaintiff's counsel.

22 Plaintiff's counsel responded to Gray in a letter sent by fax  
23 on October 25, 2009. CF 0028. Plaintiff's counsel disagreed as to  
24 the due date to complete the review, but stated, "we cannot obtain  
25 a response from Dr. Zucherman in the small amount of time allowed."  
26 Id. Plaintiff's counsel stated that a number of the questions

27 \_\_\_\_\_  
28 <sup>11</sup> Plaintiff argues that the fact that this letter was sent on the  
same day Dr. Brown turned in her final report suggests Dr. Brown  
was not truly interested in incorporating Dr. Zucherman's responses  
into her report. Pl.'s Mot. at 20.

1 Liberty sought answered were included in prior statements by Dr.  
2 Zucherman -- specifically, his January 10, 2006 and April 15, 2006  
3 letters, and a February 27, 2007 SSA medical source statement. CR  
4 0029.

5 Plaintiff's counsel also expressed concerns about the  
6 objectiveness of Dr. Brown, enclosing a deposition from another  
7 case which he claimed "shows this physician is essentially employed  
8 full time working for Liberty Mutual." CF 0046-0101. In this  
9 deposition, conducted October 25, 2009, Dr. Brown states that she  
10 has not engaged in direct patient care since December 31, 2002;  
11 that she has worked for Liberty since 2000; that she has worked  
12 approximately thirty hours per week for Liberty during several of  
13 those years; and that she reviewed more than one hundred claims for  
14 Liberty in 2005. CF 0049, 0054. Plaintiff's counsel sought the  
15 twenty-five most recent reports done for Liberty by Dr. Brown, with  
16 the names of the claimants removed. CR 0029. Plaintiff's counsel  
17 also included additional medical writing on evaluation of pain.

18 Id.

19 On October 27, 2009, Liberty upheld its denial of Plaintiff's  
20 claim, confirming its earlier determination that Plaintiff was not  
21 disabled from performing "any occupation." CF 0017-0025. In the  
22 letter, Gray referenced the findings of Dr. Kaplan and Dr. Brown;  
23 Dr. Zucherman's failure to respond to Dr. Brown's questions; the  
24 surveillance reports; the Oswestry disability scoring; and the FCE.  
25 Id. The SSA decision was not mentioned, although Gray did state  
26 that Liberty had received the correspondence sent by Plaintiff's  
27 counsel and considered this information. CF 0018. Gray stated  
28 that the record demonstrated "[m]ultiple functional inconsistencies

1 and inconsistent pain behaviors . . . raising questions regarding  
2 historical credibility and motivation." CF 0020.

3  
4 **III. CONCLUSIONS OF LAW**

5 **A. Legal Standards**

6 1. Rule 52(a)

7 Federal Rule of Civil Procedure 52(a)(1) provides: "In an  
8 action tried on the facts without a jury . . ., the court must find  
9 the facts specially and state its conclusions of law separately."  
10 In a Rule 52 motion, as opposed to a Rule 56 motion for summary  
11 judgment, the court does not determine whether there is an issue of  
12 material fact, but actually decides whether the plaintiff is  
13 disabled under the policy. See Kearney v. Standard  
14 Ins. Co., 175 F.3d 1084, 1095 (9th Cir. 1999). The court is to  
15 "evaluate the persuasiveness of conflicting testimony," and make  
16 findings of fact. Id.

17 2. ERISA Standard of Review

18 ERISA benefits determinations are to be reviewed de novo  
19 unless the language of the plan documents gives the administrator  
20 discretionary authority to determine eligibility for benefits or to  
21 construe the terms of the plan. Met. Life Ins. Co. v. Glenn, 554  
22 U.S. 105, 111-12 (2008). Where an administrator has retained  
23 discretionary authority, abuse of discretion is the appropriate  
24 standard of review. Id. A plan administrator that also acts as  
25 the funding source for benefits operates under a "structural"  
26 conflict of interest. Abatie v. Alta Health & Life Ins. Co., 458  
27 F.3d 955, 965 (9th Cir. 2006). Such a conflict "must be weighed as  
28 a factor in determining whether there is an abuse of discretion."

1 Glenn, 554 U.S. at 111-12. This is because "[a]n insurance company  
2 that approaches claims-handling unfairly in an ERISA plan may have  
3 an incentive to be more unfair than, say, a life insurer or auto-  
4 liability insurer, because it cannot be subjected to the punitive  
5 damages for bad faith that are the bogeymen of insurance companies  
6 in those fields." Salomaa v. Honda Long Term Disability Plan, No.  
7 --- F.3d ---, 2011 WL 2040934, at \*7 (9th Cir. May 26, 2011). This  
8 leads to an abuse-of-discretion standard "tempered by skepticism  
9 commensurate with the plan administrator's conflict of interest."  
10 Abatie, 458 F.3d at 959.

11 **B. Liberty's Conflict of Interest**

12 This Court has already found that Liberty operates under a  
13 structural conflict of interest and ruled that the applicable  
14 standard of review is "abuse of discretion tempered with skepticism  
15 commensurate with Liberty's conflict of interest." Aug. 2, 2010  
16 Order at 14. The Court must determine whether this conflict of  
17 interest affected Liberty's decision to deny Plaintiff's claim, and  
18 if it did, how much weight the Court should give it. Having  
19 considered all of the evidence, the Court concludes that this  
20 conflict had a considerable effect on the decisions Liberty made in  
21 denying Plaintiff's claim.

22 First, the Court notes Liberty's marked hostility to any  
23 evidence relating to Liberty's conflict of interest being shared  
24 with Plaintiff during the claims process or put before the Court.  
25 ERISA regulations provide that "the claims procedures of a plan  
26 will not be deemed to provide a claimant with a reasonable  
27 opportunity for a full and fair review" unless they provide the  
28 claimant access to "all documents, records, and other information

relevant to the claimant's claim for benefits." 29 C.F.R. § 2560.503-1(h)(2)(iii). A document is "relevant" to a claim if it:

(i) Was relied upon in making the benefit determination;

(ii) Was submitted, considered, or generated in the course of making the benefit determination, without regard to whether such document, record, or other information was relied upon in making the benefit determination;

(iii) Demonstrates compliance with the administrative processes and safeguards required pursuant to paragraph (b)(5) of this section in making the benefit determination;<sup>12</sup> or

(iv) In the case of a group health plan or a plan providing disability benefits, constitutes a statement of policy or guidance with respect to the plan concerning the denied treatment option or benefit for the claimant's diagnosis, without regard to whether such advice or statement was relied upon in making the benefit determination.

29 C.F.R. § 2560.503-1(m)(8).

Plaintiff and his counsel made multiple attempts during the claims process to acquire information relevant to determining the effect of the conflict of interest, such as information on the approval/denial rates of the reviewing doctors and "[a]ll policies and procedures of Liberty Life which are designed to mitigate the structural conflict of interest of Liberty." CF 2189-2192. Liberty summarily rejected these requests, claiming that it had submitted all the information "received, reviewed, and considered" in evaluating Plaintiff's claim, and that it was under no obligation under ERISA to produce additional information. CF 2179.

---

<sup>12</sup> Paragraph (b)(5) requires that "claims procedures contain administrative processes and safeguards designed to ensure and to verify that benefit claim determinations are made in accordance with governing plan documents and that, where appropriate, the plan provisions have been applied consistently with respect to similarly situated claimants." 29 C.F.R. § 2560.503-1(b)(5).

1       There are two possible conclusions the Court can make from the  
2 above. The first is that Liberty lacked administrative processes  
3 and safeguards to ensure claim determinations were made in  
4 accordance with plan documents and that similarly situated  
5 claimants were treated similarly, and that no statements of policy  
6 or guidance existed to guide Liberty's representatives in  
7 evaluating Plaintiff's claim. The second is that Liberty had such  
8 processes, safeguards, and policies, but refused to share them with  
9 Plaintiff during the claims process. Either situation would  
10 violate ERISA regulations.

11       Liberty's refusal to disclose relevant documents continued  
12 into this action. The Court granted Plaintiff leave to conduct  
13 limited discovery into the nature, extent, and effect of Liberty's  
14 conflict of interest on its decision-making process. Aug. 2, 2010  
15 Order. Plaintiff served on Liberty a request for such documents  
16 under Federal Rule of Civil Procedure 34, but Liberty objected to  
17 the requests as vague and ambiguous and "exceed[ing] the scope of  
18 permissible discovery in ERISA." Padway Decl. Ex. 2 ("Def.'s  
19 Resp.") at 24.<sup>13</sup> Rather than produce evidence, Liberty stated, in  
20 a response not attributed to a specific declarant, that it had  
21 "employed a number of measures to insure that its claim  
22 determinations are not influenced by financial considerations,"  
23 including locating disability case managers in different offices,  
24 cities and states than employees who make underwriting and premium  
25 decisions. Id. at 25. Liberty continued: "at no time has the  
26 compensation the claims personnel involved in the handling of  
27

---

28 <sup>13</sup> Laurence F. Padway ("Padway"), counsel for Plaintiff, filed a  
declaration in support of Plaintiff's Motion. ECF No. 43.

1 Plaintiff's claim or the appeal of claim determinations been based  
2 on or determined according to the number of claims for disability  
3 benefits that have been denied or terminated, including  
4 plaintiff's." Id. This is an improper response to Plaintiff's  
5 Rule 34 request. The sole evidence Liberty filed in support of its  
6 Motion is the declaration of McGee, a litigation manager of  
7 disability claims for Liberty, who declares that Liberty takes  
8 steps "to ensure that a claim decision is not influenced by the  
9 company's financial interests," such as geographically separating  
10 disability case managers and underwriters and not compensating  
11 claims personnel "according to the number of claims for disability  
12 benefits that have been denied or terminated" or number of appeal  
13 denials. McGee Decl. ¶¶ 1-4.<sup>14</sup>

14 Failure to present extrinsic evidence of an effort to assure  
15 accurate and unbiased claims assessment, such as "statistics  
16 regarding [the administrator's] rate of claims denials or how  
17 frequently it contracts with the file reviewers it employ[s]," is a  
18 factor according significant weight to the conflict of interest.  
19 Montour v. Hartford Life & Acc. Ins. Co., 588 F.3d 623, 634 (9th  
20 Cir. 2009). The Court finds that there is very little evidence of  
21 an effort to limit the effect of Liberty's conflict of interest.  
22 The Court also finds that by refusing to respond to Plaintiff's  
23 requests for information, Plaintiff's right to a "full and fair  
24 review" under 29 C.F.R. § 2560.503-1 was compromised.

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25  
26 <sup>14</sup> Liberty offers its response to Plaintiff's Rule 34 request, as  
27 well as the McGee declaration, as evidence that Liberty took steps  
28 to minimize the effect of the conflict of interest. Def.'s Opp'n  
at 4. The Court finds Liberty's Rule 34 response to be improper,  
and it gives little weight to the statements of McGee, who admits  
that she works within Liberty's litigation department and is  
familiar with Plaintiff's claim.



1 Another factor is the administrator's "decision to conduct a  
2 'pure paper' review . . . that is, to hire doctors to review  
3 [plaintiff's] files rather than to conduct an in-person medical  
4 evaluation of him." Montour, 588 F.3d at 634. Here, Drs. Bonar,  
5 Kaplan, and Brown all completed pure paper reviews of Plaintiff's  
6 file. Liberty alleges that no physical examination was performed  
7 because the operative question was whether Plaintiff was disabled  
8 as of February 2006, and so an inquiry into his current physical  
9 status would be of little value. Following this logic, the 2009  
10 surveillance video would be of little probative value of whether  
11 Plaintiff was disabled in 2006, yet Liberty placed great weight on  
12 the surveillance in its final benefits denial. As such, there are  
13 internal logical conflicts within Liberty's argument.

14 Another factor in determining what weight to afford a conflict  
15 of interest is a plan administrator's failure to respond to a  
16 contrary SSA disability determination. Montour, 588 F.3d at 634.  
17 "While ERISA plan administrators are not bound by the SSA's  
18 determination, complete disregard for a contrary conclusion without  
19 so much as an explanation raises questions about whether an adverse  
20 benefits determination was the product of a principled and  
21 deliberative reasoning process," and "may indicate a failure to  
22 consider relevant evidence." Id. Liberty claims that it  
23 considered the SSA decision in which Plaintiff was found to suffer  
24 from a long-term disability, but there is nothing in the Claim File  
25 to support this contention. Gray does not mention it by name in  
26 the October 27, 2009 denial letter. In her report, Dr. Brown  
27 states she considered it, but it is not discussed.

28

1 Another factor is Liberty's failure to provide Plaintiff with  
2 guidance as to what sort of evidence Liberty would find acceptable  
3 to establish a disability based on Plaintiff's pain. A plan  
4 administrator denying benefits in the first instance must "notify  
5 the claimant not just of the opportunity for internal agency review  
6 of that decision but also of what additional information would be  
7 necessary to perfect the claim." Montour, 588 F.3d at 636  
8 (quotation marks omitted). In its initial claim denial, Liberty  
9 suggested Plaintiff include "an opinion by Dr. Zucherman of the  
10 peer review, any office notes, diagnostic test results, hospital  
11 records, or any additional information which you feel will support  
12 Mr. Prado's claim." CF 2196. Plaintiff asked again and again for  
13 clarification as to what evidence Liberty would consider to be  
14 credible objective evidence of Plaintiff's pain, and was rebuffed  
15 repeatedly. Liberty's responses offered no guidance as to how  
16 Plaintiff could perfect his claim. Liberty's failures are all the  
17 more troubling given that the Court found in Prado I that Liberty  
18 had "provided no guidance to Plaintiff for what, specifically,  
19 Liberty needed in order to make an informed decision on Plaintiff's  
20 claim." Prado I at 6.

21 Yet another factor is Liberty's reliance, at the eleventh  
22 hour, on the surveillance footage. "[A]n administrator that adds,  
23 in its final decision, a new reason for denial, a maneuver that has  
24 the effect of insulating the rationale from review, contravenes the  
25 purpose of ERISA." Abatie, 458 F.3d at 974. "This procedural  
26 violation must be weighed ... in deciding whether [the  
27 administrator] abused its discretion." Id. While Liberty's  
28 initial denial was premised on a lack of evidence of physical

1 impairment, its final decision hinged on the Plaintiff's lack of  
2 credibility in light of the surveillance footage. Furthermore,  
3 Liberty's last-minute reliance on the surveillance footage did not  
4 give Plaintiff an opportunity to respond to this basis for denial.

5 The Court also notes several tactics Liberty used which  
6 Plaintiff alleges had the effect of compromising the fairness of  
7 the claims process. Plaintiff points to Liberty's refusal to  
8 promptly identify the names of its reviewing physicians; the  
9 inconsistencies between the date of Dr. Kaplan's report and the  
10 dates Dr. Kaplan alleges he attempted to contact Dr. Zucherman; the  
11 fact that calls to Dr. Zucherman were made at odd hours; and the  
12 fact that Liberty claimed an extension of the appeals period was  
13 required due to outstanding requests for information when no such  
14 outstanding requests existed. See Pl.'s Mot. While these may not  
15 be actionable in themselves, they do create the impression that the  
16 individuals handling and evaluating Plaintiff's claim on behalf of  
17 Liberty were less interested in offering a neutral and fair  
18 evaluation of Plaintiff's claim than they were in erecting  
19 procedural roadblocks.

20 Finally, the Court considers the evidence in the Claim File  
21 suggesting that Liberty's reviewing doctors operated under a  
22 conflict of interest. The evidence submitted by Plaintiff suggests  
23 Dr. Brown has not treated patients since 2002, and consults for  
24 several disability insurers. CF 0048. She has stated that she  
25 regularly worked upwards of thirty hours per week evaluating claims  
26 for Liberty. CF 0049. Similar evidence suggests Drs. Bomar and  
27 Kaplan operated under a conflict of interest. Liberty had the  
28 opportunity to add to the Claim File evidence that the medical

1 examiners they contracted with where shielded from bias, but chose  
2 not to do so.

3 The Court concludes that Liberty's conflict of interest had a  
4 marked and pervasive effect on its claims determination process.  
5 It tempers its abuse-of-discretion review accordingly.

6 **C. Abuse of Discretion**

7 When there is a conflict of interest, "a modicum of evidence  
8 in the record supporting the administrator's decision will not  
9 alone suffice." Montour, 588 F.3d at 626. A plan administrator  
10 abuses its discretion if its decision is "(1) illogical, (2)  
11 implausible, or (3) without support in inferences that may be drawn  
12 from the facts in the record." Salomaa, 2011 WL 2040934, at \*8.  
13 In Salomaa, the Ninth Circuit reversed a plan administrator's  
14 denial under this standard because (1) every doctor who examined  
15 the plaintiff concluded that he was disabled; (2) the plan  
16 administrator demanded objective tests to establish the existence  
17 of a condition for which there are no objective tests; (3) the  
18 administrator failed to consider an SSA disability award; (4) the  
19 reasons for denial shifted as they were refuted, were largely  
20 unsupported by the medical file, and only the denial stayed  
21 constant; and (5) the plan administrator failed to engage in the  
22 required "meaningful dialogue" with plaintiff. Id.

23 The Court finds many similarities between the present case and  
24 Salomaa. Dr. Zucherman consistently concluded that Plaintiff was  
25 totally disabled. Dr. Sigurdson concluded he suffered from a  
26 disability precluding heavy work and was "temporarily totally  
27 disabled as far as the neck and arms is concerned." CF 1993. No  
28 doctor who examined Plaintiff around February 28, 2006 determined

1 that Plaintiff was capable of returning to full-time work. Liberty  
2 had the opportunity and right under the Plan to examine Plaintiff,  
3 but chose not to.

4 Second, while Liberty never demanded objective tests of  
5 Plaintiff's pain, the reviewing doctors discounted Plaintiff's  
6 self-reported pain as "subjective." It is clear from Dr. Kaplan's  
7 report that the lack of objective evidence of disability was a  
8 major factor in his conclusion that Plaintiff was not disabled, and  
9 it is clear that he gave little weight to Plaintiff's subjective  
10 reports of pain. CF 2225 (finding "no objective anatomical basis"  
11 for restrictions, and concluding, "as of the present time the  
12 claimant's presentation is essentially that of subjective pain with  
13 subjective limitations in spinal range of motion without any  
14 anatomical lesion or physiological reason to explain these reported  
15 symptoms"). Liberty discounted the Oswestry scores and concluded  
16 that the FCE testing was unreliable. Thus, while Liberty did not  
17 demand objective tests, it placed little weight on Plaintiff's  
18 subjective reports, discredited every objective test conducted and  
19 submitted by Plaintiff, and refused to identify an objective test  
20 that Liberty deemed acceptable.

21 Third, Liberty clearly failed to consider the SSA disability  
22 award. It is not mentioned in the final denial letter, and is not  
23 discussed in Dr. Brown's report.

24 Fourth, as stated above, Liberty's reasons for denial shifted  
25 as they were refuted. The final reasons for denial are also  
26 unsupported by the record. Liberty treats the surveillance footage  
27 as a smoking gun, but a careful review of the record shows  
28 otherwise. As Plaintiff points out, much of the activity Horsemen

1 claimed to have witnessed is not captured in the video footage.  
2 The activity reported is not inconsistent with Plaintiff's self-  
3 reported activity. In the questionnaire submitted in July 2008,  
4 Plaintiff stated he could sit, stand, or walk for periods of ten to  
5 fifteen minutes; that he left his house daily; and that he could  
6 drive his daughter to work, tend to his garden, wash his car, and  
7 carry light groceries. CF 3023-3024. This level of activity is  
8 what is demonstrated in the surveillance video. Liberty submits  
9 twenty minutes of surveillance footage -- culled from six days of  
10 surveillance -- as evidence that Plaintiff could walk, stand, and  
11 sit for periods of thirty minutes or longer. The evidence simply  
12 does not show this. Furthermore, several doctors who performed in-  
13 person evaluations of Plaintiff noted that his gait and range of  
14 motion was normal. E.g., CF 1852-1854, 1470. Thus, the fact that  
15 Plaintiff did not display "visible signs of hesitation or  
16 restriction" is not inconsistent with the record.

17 That Liberty also premises its final denial on Dr. Zucherman's  
18 failure to respond to Dr. Brown's request for information is  
19 perplexing. Liberty did not explain to Plaintiff why Dr.  
20 Zucherman's response was critical during the appeal, and it has  
21 failed to do so in this action. Most of the information sought was  
22 already in the record. Dr. Zucherman had made a determination that  
23 as of February, 2006, Plaintiff was completely disabled. On May 4,  
24 2009, he clarified that he was "not a qualified medical examiner"  
25 and that the limitations were "based on subjective complaints," but  
26 otherwise confirmed this determination, finding "part-time light  
27 duty work with control over his workstation" to be a "reasonable  
28 expectation." CF 0582.

1       There are other inconsistencies between Liberty's final denial  
2 and the record. Dr. Brown clearly states that her report did not  
3 address "possible impairment related to chronic headaches and  
4 hypertension, as these fall beyond my current area of expertise."  
5 CF 0360. But it is clear from the record that Plaintiff's  
6 headaches were a major cause of his disability. Similarly, Dr.  
7 Brown concludes that Plaintiff's activity would be restricted to  
8 lifting, carrying, pushing, and pulling weights up to ten pounds,  
9 that he could not perform overhead work, and that he would be  
10 limited to "occasional walking or standing, for 30 minutes at a  
11 time." CF 0361. These restrictions are inconsistent with the  
12 restrictions Cooper considered when he identified five suitable  
13 occupations for Plaintiff that existed within his local and  
14 regional economy. CF 2233-2235. Cooper had assumed Plaintiff was  
15 capable of lifting up to twenty pounds and would not otherwise be  
16 restricted, save for "avoidance of more than occasional bending,  
17 squatting, stooping or kneeling." CF 2308-2313.

18       Finally, Liberty clearly failed to engage in meaningful  
19 dialogue with Plaintiff by failing to provide guidance on how to  
20 perfect his claim, refusing Plaintiff's repeated requests for  
21 information, and denying Plaintiff the opportunity to respond to  
22 Dr. Brown's analysis of the surveillance video.

23       On the basis of the above, the Court finds Liberty abused its  
24 discretion in denying Plaintiff's claim. Having considered the  
25 evidence, the Court finds that Plaintiff is disabled under the "any  
26 occupation" standard as of February 28, 2006, and is thus entitled  
27 to long-term disability benefits under the Plan.

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**D. Plaintiff's Claim under California Insurance Code 10111.2**

Plaintiff has filed a separate claim against Liberty for interest due under section 10111.2 of California's Insurance Code. Pl.'s Mot at 25. Section 10111.2 provides for prejudgment interest at a rate of ten percent. Cal. Ins. Code § 10111.2. Liberty argues that section 10111.2 is preempted by ERISA. Many courts have found that allowing a plaintiff to proceed with a state law claim under section 10111.2 would effectively impose a mandatory prejudgment interest rate of ten percent on successful ERISA claims, improperly expanding the scope of ERISA damages and supplementing the ERISA enforcement remedy. E.g., White v. Coblentz, Patch and Bass LLP Long Term Disability Ins. Plan, No. 10-1855, 2011 WL 2531193, at \*6 (N.D. Cal. June 24, 2011); Turnispeed v. Educ. Mgmt. LLC's Emp. Disability Plan, No. 09-3811, 2010 WL 140384, at \*4 (N.D. Cal. Jan. 13, 2010); Minton v. Deloitte & Touche USA LLP Plan, 631 F. Supp. 2d 1213, 1220 (N.D. Cal. 2009). Accordingly, the Court finds Plaintiff's claim for interest under section 10111.2 to be preempted by ERISA, and finds for Liberty on this claim.

**E. Plaintiff's Claim under 29 U.S.C. § 1332(c)**

Plaintiff argues that Liberty failed to provide documents during the claims procedure, and thus Liberty must pay 29 U.S.C. 1332(c)'s daily statutory penalty for failing to provide documents. Pl.'s Mot at 23. ERISA provides that any "administrator" who "fails to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator)"



1 may be liable in the court's discretion for an amount up to \$100  
2 per day from the date of such failure or refusal." 29 U.S.C. §  
3 1332(c). Plaintiff claims that Liberty failed to produce the Plan  
4 documents and "relevant" documents under 29 C.F.R. § 2560.503-  
5 1(m)(8), and thus should be liable under section 1332(c).

6 Liberty argues that it served as the "claims administrator,"  
7 and not the "plan administrator," and that section 1332(c) only  
8 applies to plan administrators. Liberty also argues that section  
9 1332(c) does not extend to "relevant" documents under 29 C.F.R. §  
10 2560.503-1(m)(8), and that it produced all Plan documents during  
11 the claims process.

12 The Court has determined that by failing to produce "relevant"  
13 documents during the claims process, Liberty denied Plaintiff a  
14 "full and fair review" of his claim. At issue is whether Liberty  
15 should be subject to the \$100-per-day penalty under section 1332(c)  
16 for this failure. By its terms, section 1332(c) is limited to  
17 information required by "this subchapter." 29 U.S.C. § 1332(c).  
18 As such, it does not extend to documents identified in 29 C.F.R. §  
19 2560.503-1. See Ramos v. Bank of America, --- F. Supp. 2d ---,  
20 2011 WL 900365, at \*2 (N. D. Cal. Mar. 15, 2011) ("While §  
21 2560.503-1 does impose requirements on plans with regard to claim  
22 procedures, nothing in the statutory or regulatory scheme suggests  
23 that an ERISA claimant may bring an action for civil penalties  
24 under § 1132(c) for a plan's failure to comply with those  
25 requirements."). The Court finds that Liberty satisfied its  
26 disclosure duties under section 1132(c) by producing the Policy and  
27 SPD, and finds for Liberty on this claim.

28 ///

**F. Attorneys' Fees**

Plaintiff additionally seeks attorneys' fees. Pl.'s FFCL ¶ 85. 29 U.S.C. § 1132(g) allows the Court to award attorneys' fees and costs in civil actions under ERISA. In Hummell v. S.E. Rykoff & Co., the Ninth Circuit provided five factors that guide the Court's exercise of discretion in this matter. 634 F.2d 446, 453 (9th Cir. 1980). These factors include: (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions. Id. A proper application of the factors generally results in an award of fees and costs to plaintiffs who succeed on any significant issue in litigation. Smith v. CMTA-IAM Pension Trust, 746 F.2d 587, 589 (9th Cir. 1984).

The Court finds that several of these factors favor an award of attorneys' fees to Plaintiff -- chiefly, Liberty's actions during the claims process and the current action in failing to produce documents and in mischaracterizing the administrative record border on bad faith. The Court finds that an award of attorneys' fees may deter other claim administrators from engaging in similar behavior. Accordingly, the Court finds an award of attorneys' fees to Plaintiff to be appropriate.

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**IV. CONCLUSION**

For the forgoing reasons, the Court finds as follows:

- The Court finds in favor of Plaintiff Antonio Prado and against Defendant Allied Domecq Spirits and Wine Group Disability Income Policy and Real Party in Interest Liberty Life Assurance Company of Boston on Plaintiff's first claim for relief for failure to extend benefits under a long-term disability plan covered by ERISA. Plaintiff is entitled to back benefits from March 1, 2006 until the date thirty days after the date of this Order. The parties are to meet and confer on the amount of back benefits and file a stipulation on that amount within fourteen (14) days of the date of this Order. If the parties are unable to agree, they shall each file within fourteen (14) days of the date of this Order a letter brief not to exceed three pages setting forth their position. Commencing thirty (30) days after the date of this Order, Liberty shall pay Plaintiff monthly benefits as they come due for so long as he remains disabled and eligible for benefits under the policy.
- The Court finds in favor of Liberty and against Plaintiff on Plaintiff's second claim for relief for interest under California Insurance Code § 10111.2.
- The Court finds in favor of Liberty and against Plaintiff on Plaintiff's third claim for relief for failure to produce records under 29 U.S.C. § 1332(c).
- Plaintiff is entitled to attorneys' fees and costs under 29 U.S.C. § 1132(g). Within thirty (30) days of this Order, Plaintiff shall file a motion for attorneys' fees, supported

1 with appropriate evidence. Liberty shall have fourteen (14)  
2 days from to object to Plaintiff's motion or the evidence  
3 submitted in support of it. The Court will enter judgment in  
4 this action after it rules on Plaintiff's motion. If  
5 Plaintiff fails to file a motion for attorneys' fees within  
6 this timeframe, the Court will enter its final judgment in  
7 this action and close the case.

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9 IT IS SO ORDERED.

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11 Dated: July 22, 2011

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UNITED STATES DISTRICT JUDGE